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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Ex Parte

In the Matter of Petition for Partial Reconsideration and/or Clarification of Sprint
Corporation, CC Docket No. 98-147,

Dear Ms. Salas:

NorthPoint Communications (NorthPoint) and Covad Communications Company (Covad) urge the Commission to take immediate action in the above-referenced proceeding to clarify that its existing collocation rules require incumbent LECs to allow competitors to access central offices and to install, maintain and repair their equipment 24 hours a day, seven days a week. The Commission must make clear that incumbent LECs may not eviscerate collocation rules by using overly-broad, discretionary "maintenance windows" or similar limitations on competitors' access to their equipment.

Commission Rules Permit "24x7" Access to Collocation Equipment

The Commission's existing rules entitle competitors to "24x7" access to their collocated equipment:

An incumbent LEC must allow collocating parties to access their collocated equipment 24 hours a day, seven days a week, without requiring either a security escort of any kind or delaying a competitor's employees' entry into the incumbent LEC's premises.¹

In explaining its rationale for this rule, the Commission stated, "in order to provide customers with a competitive level of service, we agree with commenters that competitive LECs must have access to their collocated equipment 24 hours a day, seven days a week. If competitors do not have such access, they will be unable to service and maintain equipment or respond to customer outages in a timely manner."

As evidenced by the terms of collocation amendments to their interconnection agreements, incumbents and competitors originally shared a clear understanding that this rule

¹ 47 C.F.R. Section 51.323(h)(2)(i).

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permits competitors to install, maintain, or repair their equipment at any time of day. For example, Covad's interconnection agreement with GTE provides that "Covad shall have access to the Collocation Space twenty-four (24) hours a day, seven (7) days a week, without requiring either a security escort of any kind or delaying a competitor's employees' entry into GTE premises in any way."² In addition, NorthPoint's interconnection agreement with GTE includes a provision that states: "NorthPoint will store equipment and materials within the collocation space when work is not in progress (e.g., overnight)."³ Clearly, the parties understood that work on equipment would likely occur during normal business hours. Moreover, until recently, every incumbent LEC permitted unfettered, "24x7" access to collocated equipment for purposes of installation, maintenance, and repair.

GTE Wants to Create an Enormous Loophole in this Rule

At least one incumbent LEC, however, has attempted to create a loophole that eviscerates this rule. In recent weeks, GTE has unilaterally imposed a "maintenance window" that it claims is designed to apply only to "high risk" activities. In practice, however, this maintenance window precludes nearly every activity associated with installing, maintaining, and repairing competitors' equipment. Moreover, by giving its central office managers discretion in applying the window, GTE's policy is ripe for discriminatory application.

Within the last several weeks, GTE has put in place its new practice of denying CLEC access to central offices. Specifically, GTE has informed NorthPoint and Covad that nearly all work relating to collocated equipment can only take place during the overnight hours – either ten p.m. to six a.m. or midnight to 4 a.m., depending on the nature of the work. Although GTE has advised both Covad and NorthPoint that they still have "24x7" access to central offices, GTE has made clear that actual work in the central office can only be performed overnight – and that access to the building does not carry with it the right to actually perform any work there.

GTE has acknowledged that this policy change was the result of an incident involving GTE-employed contractors who damaged some central office equipment in Texas in the course of performing work for GTE. As a result, GTE imposed a policy on itself, purporting to restrict installation of GTE equipment to the overnight hours.⁴ GTE now contends that it is simply applying that policy in a nondiscriminatory manner to CLECs.

Limitations on access to central office equipment are inherently discriminatory. The historical application of the maintenance window demonstrates that it is rife with opportunities for discriminatory application. For example, as stated above, GTE has asserted that its policy

² Covad/GTE Interconnection Agreement Amendment at para. 4.4

³ Collocation Amendment, Interconnection Agreement Between Northpoint and GTE, ¶4.3.7.

⁴ GTE claims that the overnight provisioning policy was always in place, but has never before been enforced. There is no provision in either NorthPoint's or Covad's interconnection agreements with GTE that states that collocation provisioning must take place during overnight hours – only that each party has 24x7 access to collocation space. The policy to which GTE refers is found only in an internal GTE policy document, the Network Maintenance Window document, which applies to GTE employees and contractors and not to competitive LECs.

has always been in place, but never before enforced. In a meeting with NorthPoint, Covad, and representatives of the Commission's Enforcement Bureau, GTE acknowledged that, when it has been enforced, the policy has been enforced on a somewhat inconsistent basis. Although the written policy GTE purportedly applies to itself identifies a laundry list of prohibited activities,⁵ GTE told NorthPoint and Covad that, in fact, it only enforces the window in cases where competitors' collocation space is located close to the "backplane" of GTE's own equipment. Covad noted, however, that it had been forced to provision its collocation space in the Irving West central office in Texas during overnight hours, a central office in which Covad's equipment is collocated two floors away from GTE's equipment. GTE is correct that its policy is not being enforced consistently, and for this reason alone, it contravenes the policy goals of the Commission's rules.

GTE has also indicated that its central office manager will make decisions about the policy on a case-by-case basis. Selective enforcement of a policy imposing competitively sensitive limitations on access to equipment by an employee of the incumbent is inherently suspect.⁶ Any incumbent limitation on access to central office equipment, whether or not it purportedly applies to the incumbent as well, faces the same inherent challenge to implementation on a nondiscriminatory basis. It is simply impossible to ensure consistent enforcement of such a limitation.

Finally, this type of limitation on access is discriminatory because a competitor, which is unable to offer services until it installs equipment in the central office – and thus cannot compete with GTE – suffers materially greater harm from this new policy than GTE, which already has its equipment installed and operational. If permitted to continue, GTE's maintenance window would undo all the procompetitive work of this Commission in ensuring that competitors have unfettered access to central office collocation space. GTE's historically inconsistent application of its maintenance window, the present discrepancies between its policy and implementation, the opportunity for selective enforcement by central office managers, and the disparate impact of this policy on incumbents as opposed to competitive entrants demonstrate that functional limitations on competitors' access to equipment are inherently discriminatory.

⁵ See, GTE Network Maintenance Window Policy at ¶4.1.1.

⁶ GTE's own maintenance window policy creates an exception for certain activities where "severe impacts on extreme or highly competitive market segments are likely if the activity is delayed until the maintenance window period." See, GTE Network Maintenance Window Policy at ¶6.3, entitled, Deviation Steps for Policy Exceptions. GTE recognizes that it may need an exception to the policy when its own ability to compete is affected, but fails to recognize a collocated party's right to compete.

Allowing Incumbents to Define Limitations on Access Allows Incumbents to Define the Size of the Loophole

Any limitation on access to central office equipment establishes a loophole to the Commission's careful establishment of "24x7" access. If incumbents are allowed to place limitations on access to central office equipment, then they will also be allowed to define the size of the loophole. GTE's maintenance window is a perfect example. It has defined its limitation by creating a list of ostensibly "high risk" activities that are prohibited. GTE has acknowledged, however, that its limitation relegates installation of any cageless collocation equipment to overnight hours. Similarly, in its comments in this proceeding, Bell Atlantic describes a loosely-defined "Safe Time" that would permit it to require "non-critical work" to be performed outside normal business hours.⁷ Given that "non-critical work" is not coterminous with activities that pose actual, significant risk, competitors are understandably uneasy about permitting the incumbent to define so broadly the limits of their access particularly when, as described above, these limitations are subject to selective enforcement.

NorthPoint and Covad are sensitive to concerns regarding network integrity. NorthPoint and Covad also recognize, however, that at some level, *any* work activity will pose some amount of risk, however infinitesimal. If all risk were to be avoided, no work would ever get done. The challenge is determining at what point the risk posed by a given activity rises to the level that it justifies limitations on access. In fact, NorthPoint and Covad believe that there is one activity that arguably meets this threshold amount of risk to the operations of the central office. More specifically, the carriers agree the act of powering up their newly installed equipment could be limited to periods other than normal business hours.⁸ NorthPoint and Covad stress, however, that even this risk is extremely remote, and their willingness to limit themselves to conducting this activity to certain hours of the day is an extremely conservative approach. Despite the remote nature of this risk, the other activities identified by GTE and Bell Atlantic are, by comparison, minute, and do not justify the competitive harm that limitations would impose.

Over-broad Limitations Impose Significant Delay on Collocation

The practical effects of an overly-broad limitation on access to collocation are clear. Competitive carriers seeking to serve consumers in GTE's market, for example, are forced to provision collocation space during a few hours in the middle of the night – delaying service activation, forcing additional labor costs on competitors, and denying consumers the benefits of broadband competition for days or even weeks longer than necessary.

⁷ Affidavit of Donald E. Albert at pp. 3-4, Bell Atlantic Comments of July 12, 1999, CC Docket 98-147.

⁸ Again, the language of NorthPoint's interconnection agreement with GTE demonstrates that the parties themselves recognized that other activities were not limited by the Commission's rule. The only reference to potentially risky activity in this agreement applies to initial power-up. See Collocation Amendment, Interconnection Agreement Between Northpoint and GTE, ¶4.3.8.

Relief Requested

Accordingly, NorthPoint and Covad respectfully request that the Commission clarify that its collocation rules requiring "24x7" access to collocation equipment permit competitors to access their equipment for purposes of installation, maintenance, or repair, limited only when the competitor powers up its equipment for the first time.

Ex Parte Notification

Pursuant to section 1.1206(b)(1) of the Commission's rules, 47 C.F.R. Section 1.1206(b)(1), and original and one copy of this letter are being provided to you for inclusion in the public record of the above-reference proceeding.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "William J. Bailey". The signature is stylized with a large, looped "B" at the end.

William J. Bailey
NorthPoint Communications

Jason D. Oxman
Covad Communications Company

CC: Bill Kehoe, Policy Division
Kathy Farroba, Deputy Chief, Policy Division
Michelle Carey, Chief, Policy Division